STATE OF MICHIGAN

COURT OF APPEALS

DONALD J. ZGIEB and IONA C. ZGIEB,

Plaintiffs-Appellees,

v

BRIAN L. WELLS,

Defendant-Appellant.

UNPUBLISHED
October 18, 2007

No. 271363
St. Clair Circuit Court
LC No. 05-000587-CH

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment after a bench trial, which granted plaintiffs' request for specific performance of an agreement to purchase real estate. We affirm.

Defendant's father died in December 2002, bequeathing his entire estate to defendant. The estate included two contiguous parcels of real property located at 6207 and 6209 Pointe Tremble Road in Pearl Beach, near Algonac. The lot at 6207 Pointe Tremble contained an operational marina, while 6209 Pointe Tremble had a vacant building. Plaintiffs owned the Cheers Restaurant and Cocktail Lounge next door to 6209 Pointe Tremble. Plaintiffs desired to purchase the less valuable 6209 parcel for use as a parking lot.

The estate of defendant's father owed substantial debt, including a mortgage held by defendant's aunt on both 6207 and 6209 Pointe Tremble. In June 2004, defendant's aunt, in her capacity as the estate's personal representative, filed a probate court action seeking to sell the property and satisfy the estate's debts. In the Fall of 2004, David Fernandez, a local real estate agent known to defendant and referred by a mutual friend, brokered a deal pursuant to which a local investor, Michael Weber, proposed to give defendant a one-year mortgage loan of $300,000 secured by 6207 and 6209 Pointe Tremble, and plaintiffs would purchase 6209 Pointe Tremble for $75,000. Fernandez explained at trial that he had anticipated selling the marina property for more than $500,000, thus enabling defendant to make a profit and Fernandez to obtain a commission on the sale.

On November 23, 2004, the parties entered into a purchase agreement that gave plaintiffs a one-year option to purchase 6209 Pointe Tremble for $75,000. In December 2004, defendant filed a petition in the probate court seeking to prevent his aunt from selling the properties. In the petition, defendant averred that he was the ultimate beneficiary of all estate assets, and that he had obtained the financing necessary to discharge all of the estate's debts. On January 19, 2005,

the estate conveyed to defendant via quitclaim deed title to 6207 and 6209 Pointe Tremble. Also by January 19, 2005, defendant gave Weber a mortgage to both properties in exchange for a $300,000 loan, and discharged his aunt's mortgages on 6207 and 6209 Pointe Tremble.

Plaintiffs subsequently exercised their option to purchase 6209 Pointe Tremble for $75,000, but defendant refused to proceed with the transaction. Plaintiffs then brought this action for specific performance. After a bench trial, the trial court rejected defendant's claims that plaintiffs unlawfully coerced him into entering the purchase agreement, and granted plaintiffs' request for specific performance.

On appeal, defendant raises several challenges to the trial court's decision to order specific performance. A suit for specific performance is an equitable action. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). "Equitable issues are reviewed de novo, but we review for clear error the court's findings of fact supporting its decision." *AFSCME v Bank One, NA*, 267 Mich App 281, 293; 705 NW2d 355 (2005). We review de novo the trial court's legal conclusions after a bench trial. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

First, we reject defendant's argument that the purchase agreement qualified as voidable because plaintiffs and Fernandez engaged in fraud and misrepresentation.

> The general rule is that to constitute actionable fraud it must appear: (1) [t]hat defendant made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. [*Scott v Harper Recreation, Inc*, 444 Mich 441, 446 n 3; 506 NW2d 857 (1993) (internal quotation omitted).]

"Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Services*, *supra* at 639. "Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party." *Id*. at 640.

Our review of the record reveals that multiple elements of defendant's fraud claim lack factual support in the record. The fraud claim rests largely on defendant's assertion that Fernandez, while acting as plaintiffs' agent, failed to disclose (1) his agency relationship with plaintiffs, (2) that he and plaintiffs also were friends, and (3) that plaintiffs paid him a $5,000 commission. Plaintiff Donald Zgieb and Fernandez, however, both testified that no agency relationship existed between them. Furthermore, the purchase agreement does not identify an agency relationship between plaintiffs and Fernandez, and the record otherwise contains no evidence that Fernandez either received or was entitled to a commission arising from the parties' November 23, 2004 purchase agreement.

Additionally, the record is devoid of evidence that plaintiffs made any material misrepresentations, or any false statements whatsoever, to induce defendant to enter the purchase

agreement. Defendant maintains that plaintiffs engaged in fraud by entering an agreement to purchase the property for only $75,000 when, according to defendant, he had informed Fernandez numerous times that the property's value approximated $300,000. Apart from defendant's own undocumented estimation of value, however, the record contains no evidence substantiating that 6209 Pointe Tremble had a value of $300,000. Defendant himself testified that 6209 Pointe Tremble was appraised at $150,000 in 2000, and that in 2003 he listed the property for sale at $175,000, but received no offers. According to testimony by Donald Zgieb, plaintiffs offered $75,000 for 6209 Pointe Tremble because Clay Township had assessed it at this value. Even assuming that 6209 Pointe Tremble did have a value approaching $300,000, defendant cannot show that he acted in reliance on any representation by plaintiffs that the property was worth only $75,000 when he entered the purchase agreement, given his assertion that he knew of this alleged value before he signed the purchase agreement.

Defendant also asserts with respect to his fraud claim that Fernandez knowingly misrepresented that he would act as defendant's agent, contrary MCL 339.2517. But, irrespective of whether Fernandez violated some independent duty to defendant, he is not a party to this action and his purported conduct cannot serve as a basis for finding that *plaintiffs* engaged in any fraudulent conduct.

In summary, we conclude that the trial court did not clearly err in finding defendant's fraud claim unsupported.

We next reject defendant's argument that the purchase agreement is void for unconscionability. A two-pronged test governs the determination whether a contract qualifies as unconscionable: "(1) What is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply, in a word, what are their options?; (2) Is the challenged term substantively reasonable?" *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 481; 578 NW2d 701 (1998) (internal quotation omitted). "Reasonableness is the primary consideration." *Id*.

> In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term. If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability. Substantive unconscionability exists where the challenged term is not substantively reasonable. However, a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience. [*Clark v DaimlerChrysler Corp*, 268 Mich App 138, 143-144; 706 NW2d 471 (2005) (citations omitted).]

After reviewing the record, we find no evidence supporting defendant's argument that plaintiffs unconscionably coerced him into selling 6209 Pointe Tremble for $75,000. To the extent that defendant felt "pressured" into accepting plaintiffs' offer because his aunt sought a probate court order allowing a sale of both 6207 and 6209 Pointe Tremble, this circumstance did not render the purchase agreement unconscionable. If defendant believed that plaintiffs offered

an inadequate sum, he remained free to reject their offer and pursue other offers for the property, or to seek alternative forms of financing to use in satisfying the estate's debts. The record discloses that for at least a year defendant knew of debts of his father's estate, and he acknowledged that he nonetheless failed to consult with other real estate professionals or seek conventional financing. Any economic pressure that defendant felt resulted to a large extent from his own failure to act sooner or to pursue additional financing options. Furthermore, as previously indicated, the record does not substantiate defendant's claim that the sale price of $75,000 was unconscionably low. Even if the property had a higher value, "[e]quity is not intended to aid persons who . . . make poor business decisions." *Burkhardt v Bailey*, 260 Mich App 636, 660; 680 NW2d 453 (2004). We thus find no merit to defendant's claim that the purchase agreement was voidable on the basis of unconscionability.

Defendant further asserts that the unclean hands doctrine precludes plaintiffs from obtaining any relief. *Rose v Nat'l Auction Group*, 466 Mich 453, 462; 646 NW2d 455 (2002) (observing that "one who comes into equity must come with clean hands") (internal quotation omitted). Because defendant did not specifically invoke the unclean hands doctrine in the trial court, this issue is not preserved. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). This Court may disregard issue preservation requirements, however, if the issue involves a legal question and the facts necessary for its resolution have been presented, or if our failure to consider the issue will result in manifest injustice. *Polkton*, *supra* at 95-96; *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998).

Defendant premises his unclean hands argument on his claims that plaintiffs and Fernandez had a "hidden" agency relationship that they failed to disclose, and that plaintiffs unfairly took advantage of defendant's economic situation to purchase the property for an unconscionably low price. The trial court found that these claims lacked support in the record and that plaintiffs acted appropriately. Furthermore, the trial court specifically found that defendant lacked credibility, a finding this Court will not second guess. MCR 2.613(C) (instructing that "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it"). Because we detect no clear error in the trial court's findings, we reject defendant's reliance on the unclean hands doctrine.

Defendant lastly contends that he did not possess authority to sign the purchase agreement because he lacked title to the property at the time it was signed, and that the trial court misapplied the doctrine of after-acquired title. We need not consider the propriety of the trial court's application of the after-acquired title doctrine because, irrespective of this doctrine, the trial court reached the correct result in granting plaintiffs specific performance of the purchase agreement. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006) (observing that this Court "will not reverse the lower court when it reaches the correct result, albeit for the wrong reason").

Defendant ignores the well-settled proposition that an "heir, devisee, or legatee may convey by gift or otherwise his interest in property comprising a decedent's estate prior to the final order of distribution by the probate court." *Jones v Causey*, 45 Mich App 271, 274-275; 206 NW2d 534 (1973). In MCL 554.35, the Legislature expressly has provided that "[e]xpectant estates are descendible, devisable and alienable, in the same manner as estates in possession." "Further, it is well-settled that the execution of a purchase agreement transfers an [equitable] interest in property." *Lake Forest Partners 2, Inc v Dep't of Treasury*, 271 Mich App 244, 249-

250; 720 NW2d 770 (2006). When defendant signed the purchase agreement, he constituted the sole heir to his father's entire estate, and he later obtained full title to the real property pursuant to the terms of his father's will and trust. Consequently, the trial court correctly found that defendant had a transferable interest in the subject property, and that the purchase agreement was not void for lack of title.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher